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In re Application of
Rajendra Kumar Bera
Application No. 09/728,096
Filed: December 1, 2000
Attorney Docket No. JA999-704

OFFICE OF PETITIONS
ON PETITION

This is a decision on the petition under 37 CFR 1.137(a), filed December 15, 2004, to revive the above-identified application.

The petition is **DISMISSED**.

Any further petition to revive the above-identified application must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Petition under 37 CFR 1.137." This is **not** a final agency action within the meaning of 5 U.S.C. § 704.

The above-identified application became abandoned for failure to reply in a timely manner to the non-final Office action mailed June 27, 2003, which set a shortened statutory period for reply of three (3) months. No extensions of time under the provisions of 37 CFR 1.136(a) were obtained. Accordingly, the above-identified application became abandoned on September 28, 2003.

A grantable petition to revive an abandoned application under 37 CFR 1.137(a) must be accompanied by: (1) the required reply (unless previously filed), which may be met by the filing of a continuing application in a nonprovisional application abandoned for failure to prosecute, but must be the payment of the issue fee or any outstanding balance thereof in an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof; (2) the petition fee required by 37 CFR 1.17(l); (3) an adequate showing to the satisfaction of the Commissioner that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(a) was unavoidable; and (4) a terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) for an application filed prior to June 8, 1995. This petition lacks item (3).

The showing of record is not sufficient to establish to the satisfaction of the Commissioner that

the delay was unavoidable within the meaning of 35 U.S.C. § 133 and 37 CFR 1.137(a). See MPEP 711(c)(III)(c)(2) for a discussion of the requirements for a showing of unavoidable delay.

Decisions on reviving abandoned applications on the basis of “unavoidable” delay have adopted the reasonably prudent person standard in determining if the delay was unavoidable:

The word ‘unavoidable’ . . . is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business. It permits them in the exercise of this care to rely upon the ordinary and trustworthy agencies of mail and telegraph, worthy and reliable employees, and such other means and instrumentalities as are usually employed in such important business. If unexpectedly, or through the unforeseen fault or imperfection of these agencies and instrumentalities, there occurs a failure, it may properly be said to be unavoidable, all other conditions of promptness in its rectification being present.

In re Mattullath, 38 App. D.C. 497, 514-15 (1912)(quoting Ex parte Pratt, 1887 Dec. Comm’r Pat. 31, 32-33 (1887)); see also Winkler v. Ladd, 221 F. Supp. 550, 552, 138 USPQ 666, 167-68 (D.D.C. 1963), aff’d, 143 USPQ 172 (D.C. Cir. 1963); Ex parte Henrich, 1913 Dec. Comm’r Pat. 139, 141 (1913). In addition, decisions on revival are made on a “case-by-case basis, taking all the facts and circumstances into account.” Smith v. Mossinghoff 671 F.2d 533, 538, 213 USPQ 977, 982 (D.C. Cir. 1982). Finally, a petition cannot be granted where a petitioner has failed to meet his or her burden of establishing that the delay was “unavoidable.” Haines v. Quigg 673 F. Supp. 314, 316-17, 5 USPQ2d 1130, 1131-32 (N.D. Ind. 1987).

Petitioner’s argument is not persuasive because petitioner has not provided sufficient documentation that the non-final Office action mailed June 27, 2003 was not received at the address of record at the time of mailing thereof; i.e., Ronald L. Drumheller, 94 Teakettle Spout Road, Mahopac, NY, 10541. A review of the record indicates that on February 1, 2002, Manny Schecter, an attorney designated in the declaration filed with the application, appointed T. Rao Coca and directed the Office to send all the communications to him at 650 Harry Road, San Jose, CA 95120. However, on August 6, 2002, T. Rao Coca, an attorney of record, filed a change of correspondence address to 94 Teakettle Spout Road, Mahopac, NY 10541. A review of the record indicates no irregularity in the mailing of the June 17, 2003 Office action, and in the absence of any irregularity there is a strong presumption that the Office action was properly mailed to the address of record at the time.

The unavoidable standard requires that petitioner establish that the entire delay in responding to the Office action was unavoidable. This requires that petitioner: 1) provide a statement that the Office action was not received; 2) attest to having searched the file jacket and docket records with no results, and 3) provide a copy of the docket records where the Office action would have been entered had it been received and docketed. See MPEP 711.03(c).

If petitioner cannot provide evidence of the nature required above or simply does not wish to, petitioner may wish to consider filing a petition under the unintentional provisions of 37 CFR

1.137(b). Public Law 97-247, which revised patent and trademark fees, provides for the revival of an "unintentionally" abandoned application without a showing that the delay in prosecution or in late payment of an issue fee was "unavoidable." See 37 CFR 1.137(b) in effect as of December 1, 1997. *Note Changes to Patent Practice and Procedure; Final Rule Notice, 62 Fed. Reg. 53131 (October 10, 1997), 1203 Off. Gaz. Patent Office 63 (October 21, 1997).* An "unintentional" petition must be accompanied by the \$1,500.00 petition fee.

The filing of a petition under the unintentional standard cannot be intentionally delayed and therefore should be filed promptly. A person seeking revival due to unintentional delay cannot make a statement that the delay was unintentional unless the entire delay, including the delay from the date it was discovered that the application was abandoned until the filing of the petition to revive under 37 CFR 1.137(b), was unintentional. A statement of unintentional delay is not appropriate if petitioner intentionally delayed the filing of a petition for revival under 37 CFR 1.137(b).

Further correspondence with respect to this matter should be addressed as follows:

By mail: Mail Stop PETITIONS
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By hand: Customer Service Window
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 401 Dulany Street
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By fax: (571) 273-8300
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Telephone inquiries concerning this decision should be directed to Wan Laymon at (571) 272-3220.



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